



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: APRIL 13, 2023

IN THE MATTER OF:

Appeal Board No. 627661

PRESENT: MARILYN P. O'MARA, MEMBER

In Appeal Board Nos. 627659, 627660 and 627661, the Commissioner of Labor appeals from the decisions of the Administrative Law Judge filed January 23, 2023, which overruled the initial determinations holding the claimant ineligible to receive benefits, effective May 17, 2021 through June 13, 2021, on the basis that the claimant was not totally unemployed and/or had earnings that exceeded the statutory limitation; charging the claimant with an overpayment of \$657.00 in Pandemic Unemployment Assistance (PUA) benefits recoverable pursuant to Section 2102 (h) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020 and 20 CFR Section 625.14 (a), and Federal Pandemic Unemployment Compensation (FPUC) benefits of \$900.00 recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020; and reducing the claimant's right to receive future benefits by zero effective days and charging a civil penalty of \$233.55 on the basis that the claimant made willful misrepresentations to obtain benefits.

At the combined telephone conference hearing before the Administrative Law Judge, all parties were accorded a full opportunity to be heard and testimony was taken. There were appearances by the claimant and on behalf of the employer.

The Board considered the arguments contained in the written statement submitted on behalf of the Commissioner of Labor.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant, a lighting designer who works on a freelance basis, filed a claim for benefits on May 18, 2020 with an effective date of March 9, 2020. On May 28, 2021, the claimant entered into a contract, dated May 27, 2021, to provide lighting design services to a theater. The contract provided for the claimant to provide services at two different locations in exchange for a total of \$10,000.00. She would be paid \$5,000.00 upon signing the contract, \$3,000.00 upon the first preview at one location, and \$2,000.00 upon the first preview at the other location. The payments would be made to the claimant through her talent agency.

The theater company issued the claimant a \$4,000.00 check dated May 27, 2021 and an additional check of \$1,000.00 dated June 3, 2021. As specified in the contract, these checks were paid through the claimant's talent agency.

In each of the weeks ending May 23, May 30, and June 13, 2021, the claimant worked for a period of time that was less than four hours. Each week, she certified for benefits online and answered questions that asked how many hours she worked that week and whether she earned more than \$504.00 that week. Each week, she certified that she worked zero to four hours, which corresponded to zero days per week, and certified that she did not earn more than \$504.00. The claimant received a total of \$657.00 in PUA benefits and \$900.00 in FPUC benefits for these three weeks.

OPINION: The credible evidence establishes that the claimant entered into a lighting design contract with a theater on May 28, 2021, with \$5,000.00 due upon signing. The theater paid \$5,000.00 to the claimant by checks dated May 27 and June 3, 2021. The claimant also worked for periods of less than four hours per week in each of the weeks ending May 23, May 30, and June 13, 2021. The claimant's work of less than four hours per week corresponded to less than one day of work per week (see 12 NYCRR § 470.2[h][2]). Therefore, these small

amounts of work did not affect her eligibility for benefits. The \$5,000.00 that became due when the claimant signed her contract on May 28, however, constituted earnings for that week. Since the claimant earned more than the maximum benefit rate of \$504.00, the claimant was not totally unemployed during the week ending May 30, 2021. Accordingly, we conclude that the claimant is ineligible for benefits with respect to that week. We further conclude that the PUA and FPUC benefits paid to the claimant with respect to that week are recoverable pursuant to federal law. The amount of the overpayment is referred to the Department of Labor for recalculation in

accordance with this decision.

The credible evidence further establishes that, in each of the weeks ending May 23, May 30, and June 13, 2021, the claimant certified that she worked zero to four hours and did not earn more than \$504.00. Her certifications to working zero to four hours each week were truthful. Her certification to not earning more than \$504.00 in the week ending May 30, 2021, however, was false, as the claimant became entitled to \$5,000.00 upon signing her contract on May 28, 2021. Further, as the claimant's contract specified that this money was payable upon signing, the claimant knew that she earned this amount. Therefore, her false certification constitutes a willful misrepresentation for purposes of the Unemployment Insurance Law. We are not persuaded otherwise by the claimant's contention that she did not know when she would be paid because the payments were made to her talent agency instead of to her directly. The claimant was answering a question that asked how much money she earned that week, not how much money she was paid. Accordingly, we further conclude that, with respect to the week ending May 30, 2021, the claimant is subject to a civil monetary penalty. The amount of the civil penalty is referred to the Department of Labor for recalculation in accordance with this decision.

DECISION: The decisions of the Administrative Law Judge are modified as follows and, as so modified, are affirmed.

In Appeal Board No. 627659, the initial determination, holding the claimant ineligible to receive benefits, effective May 17, 2021 through June 13, 2021, on the basis that the claimant was not totally unemployed and/or had earnings that exceeded the statutory limitation, is modified to be effective May 24, 2021 through May 30, 2021, and, as so modified, is sustained.

In Appeal Board No. 627660, the initial determination, charging the claimant with an overpayment of \$657.00 in Pandemic Unemployment Assistance (PUA) benefits recoverable pursuant to Section 2102 (h) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020 and 20 CFR Section 625.14 (a), and Federal Pandemic Unemployment Compensation (FPUC) benefits of \$900.00 recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, is modified to be effective with respect to the week ending May 30, 2021, only, and, as so modified, is sustained.

In Appeal Board No. 627661, the initial determination, reducing the claimant's

right to receive future benefits by zero effective days and charging a civil penalty of \$233.55 on the basis that the claimant made willful misrepresentations to obtain benefits, is modified to be effective with respect to the week ending May 30, 2021, only, and, as so modified, is sustained.

The amounts of the overpayment and civil penalty are referred to the Department of Labor for recalculation in accordance with this decision.

MARILYN P. O'MARA, MEMBER